

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

May 13, 2002

In Re: **Petition of Tennessee UNE-P Coalition to** **)**
 Open a Contested Case Proceeding to Declare **)** **Docket No. 02-00207**
 Unbundled Switching an Unrestricted **)**
 Unbundled Network Element. **)**

FIRST REPORT AND RECOMMENDATION

This matter is before the Hearing Officer, Director Melvin J. Malone, on the *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Unbundled Switching an Unrestricted Unbundled Network Element* ("Petition"). Having timely resolved certain preliminary legal issues in this matter, the Hearing Officer has concluded that it is necessary for the Tennessee Regulatory Authority ("TRA" or "Authority") to address the statutory manner in which this matter should proceed.

I. Travel of the Case

On February 25, 2002, the Tennessee UNE-P Coalition (the "Coalition")¹ filed its *Petition* with the Authority. In the *Petition*, the Coalition requested that the Authority convene a contested case to establish local switching as an unrestricted, unbundled network element ("UNE") on a statewide basis. On February 26, 2002, the Authority granted the Coalition's

¹ The Coalition includes: Access Integrated Networks, Inc.; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; NewSouth Communications Corp.; and Z-Tel Communications, Inc.

request that this proceeding be convened as a contested case and appointed Director Melvin J. Malone to serve as the Hearing Officer to prepare this matter for a hearing before the Directors.²

On March 4, 2002, BellSouth Telecommunications, Inc. filed its *Motion of BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony*. The Coalition, on March 6, 2002, filed its *Opposition to BellSouth Motion to Dismiss*. On March 25, 2002, the Hearing Officer entered the *Order Regarding the Applicability of Tenn. Code Ann. § 65-5-209(d)*, ruling that Tenn. Code Ann. § 65-5-209(d) is not applicable to this proceeding. On April 9, 2002, the Hearing Officer issued the *Initial Order Denying BellSouth's Motion to Dismiss and to Strike*.

II. Procedural Posture

The Coalition has requested and has been granted a contested case proceeding. The Authority's decision to convene a contested case was essentially supported by its reasoned conclusion that the *Petition* contained a reasonable showing that the Coalition's legal rights, duties or privileges should properly be resolved by the Authority after an opportunity for a hearing. Still, the matter of preparing this case for hearing necessarily requires a thorough assessment of the appropriate procedural vehicle with which to move forward.

In determining the most suitable manner in which to proceed, care must be exercised after recognizing the general applicability of a favorable ruling consistent with the relief requested. After further consideration, there is the manifest conclusion that the Coalition's plea for statewide relief for all competing local telephone providers requires the prescription of a broad policy by the Authority. The reach of such a prescription would extend far beyond the

² *Order Convening a Contested Case Proceeding and Appointing a Pre-Hearing Officer*, TRA Docket No. 02-00207, p. 1 (April 8, 2002).

parties to this proceeding. Having so concluded, the Hearing Officer deems it consistent with the Coalition's pleading to advance in this proceeding by way of a rulemaking, thereby considering the Coalition's pleading as a petition for a rule.³ For exactness, it should be noted that a determination as to whether the petition for a rule should be granted has not herein been reached.

III. Discussion and Analysis

It is well settled that the Authority exercises legislative, executive, and judicial functions.⁴ Further, the Authority has substantial discretion to establish policy either through rulemaking or adjudication.⁵ As the Tennessee Court of Appeals has opined, the legislative and adjudicative functions are "closely related, and the line between them is not always clear."⁶ Hence, it is incumbent upon the Authority to tread with prudence when determining the manner by which to develop policy.⁷

Tenn. Code Ann. § 65-2-101(2) defines contested cases as "all proceedings before the [A]uthority in which the legal rights, duties, or privileges of specific parties are determined after a hearing before the [A]uthority."⁸ Generally, "[a]djudication . . . involves individual rights or duties and the determination of disputed factual issues in particular cases. It is the process by which an agency applies either law or policy, or both, to a particular set of facts."⁹ On the other hand, Tenn. Code Ann. § 65-2-101(3) provides that a rule "means every regulation, or statement

³ Moreover, advancing in this manner is consistent with the Authority's previous determination that the *Petition* sufficiently presents meritorious issues warranting resolution before the agency.

⁴ *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 158 (Tenn. Ct. App. 1992).

⁵ *Id.* at 160. This discretion, however, is not unlimited. *Id.* at 162.

⁶ *Id.* at 160.

⁷ While the Tennessee statutes "clearly empower" the Authority to promulgate rules and to conduct contested case proceedings, "the statutes provide no clear guidelines for an agency's decision whether to exercise its authority through rulemaking or case-by-case adjudication." *Id.* at 161.

⁸ Tenn. Code Ann. § 65-2-101(2) (Supp. 2001). Similarly, the Uniform Administrative Procedures Act ("UAPA") defines a contested case as "a proceeding, including a declaratory proceeding, in which the legal rights, duties or

of policy, or interpretation of general application and future effect . . . adopted by the [A]uthority . . . to implement or make specific the laws enforced or administered by it.”¹⁰ Normally, rulemaking, which is primarily concerned with considerations of policy, “is the process by which an agency lays down new prescriptions to govern the future conduct of those subject to its authority.”¹¹

Here, the Coalition has petitioned the Authority to grant relief via a contested case proceeding. The Coalition’s request for a contested case, coupled with the relief requested, creates a procedural paradox, since it seeks a policy statement from the Authority regarding local switching rather than a narrow ruling on a particular set of facts that binds only specific parties to the action, as is contemplated by Tenn. Code Ann. § 65-2-101. Guidance, if not a mandate, in addressing the paradox is presented in the Tennessee Court of Appeals’ *Tennessee Cable Television Association v. Tennessee Public Service Commission* decision.

The Tennessee Court of Appeals unequivocally declared in *Tennessee Cable Television Association v. Tennessee Public Service Commission* that rulemaking is the preferable way to formulate new policies, rules, or standards and adopted the Supreme Court of New Jersey’s *Metromedia* test¹² for determining whether an agency’s actions should be undertaken in the form of a rulemaking.¹³ Under the *Metromedia* test, an agency determination should take the form of a rulemaking if it appears, in many or most of the following circumstances, that the agency determination

privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing.” Tenn. Code Ann. § 4-5-102(3) (1998).

⁹ *Tennessee Cable Television Ass’n*, 844 S.W.2d at 161 (citations omitted).

¹⁰ Tenn. Code Ann. § 65-2-101(3) (Supp. 2001). Similarly, the UAPA defines a rule as an “agency statement of general applicability that implements or prescribes law or policy.” Tenn. Code Ann. § 4-5-102(10) (1998).

¹¹ *Tennessee Cable Television Ass’n*, 844 S.W.2d at 161 (citations omitted).

¹² See *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 478 A.2d 742, 751 (1984).

¹³ *Tennessee Cable Television Ass’n*, 844 S.W.2d at 162-63.

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.¹⁴

Before proceeding further in this matter, the Authority must apply the Metromedia test. To begin with, the Coalition asks the Authority to “establish,”¹⁵ “declare”¹⁶ or “preserve and expand”¹⁷ local switching as a “new interconnection service”¹⁸ or an “unbundled network element”¹⁹ on a statewide basis. The Coalition does not in any way propose to limit the application of its requested relief. Therefore, to grant the relief would result in a determination intended to have wide coverage encompassing a large segment of the regulated industry or the general public, that is, all competitive local exchange carriers (“CLECs”) and all incumbent local exchange carriers (“ILECs”) in Tennessee. Likewise, such a determination would be applied generally and uniformly to all similarly situated persons, that is, once again, all CLECs and ILECs in Tennessee. Moreover, there is no doubt that the relief requested is prospective. Next, to establish local switching as an unrestricted UNE statewide requires a decision that establishes general regulatory policy and prescribes standards not otherwise provided for or available, given the existing application of federal guidelines. Also, the relief requested would reflect an administrative policy not previously officially expressed by the Authority. Finally, such a

¹⁴ *Id.* at 162.

¹⁵ *Petition*, p. 1.

¹⁶ *Id.*

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 1.

¹⁹ *Id.*

determination would reflect a decision on regulatory policy in the nature of the interpretation of law or general policy.

Fairly applying the Metromedia test to the matter at hand leads to the conclusion that any substantive action taken on the issues raised in the *Petition* is more properly executed within a rulemaking framework. While one may argue that the circumstances presented herein do not fall squarely within each and every prong of the Metromedia test, on the whole, a thoughtful, neutral analysis reveals that most, if not all, of the factors set forth in the Metromedia test are present here. Thus, the intent of the Tennessee Court of Appeals is better upheld and adhered to by subjecting this proceeding to a rulemaking.

Tenn. Code Ann. § 4-5-201 sets forth the requirements for petitions for or against rules as follows:

(a) Except where the right to petition for a rule is restricted by statute to a designated group or except where the form of procedure for such petition is otherwise prescribed by statute, any municipality, corporation or any five (5) or more persons having an interest in a rule may petition an agency requesting the adoption, amendment or repeal of such rule.

(b) Such petition shall state clearly and concisely:

- (1) The substance or nature of the rulemaking which is requested;
- (2) The reasons for the request and the petitioner's interest in the request; and
- (3) Reference to the authority of the agency to take the action which is requested.²⁰

The Coalition consists of five or more persons having an interest in establishing local switching as an unrestricted UNE. The *Petition* identifies the substance of the relief sought, a declaration that local switching be made available on a statewide basis as an unrestricted UNE. The *Petition* also lists reasons to grant the Coalition's requested relief, including that doing so will: (1) help to ensure the continued viability of UNE-P²¹ and (2) enable the Authority to "proactively act to

²⁰ Tenn. Code Ann. § 4-5-201 (1998).

²¹ *Petition*, p. 2.

ensure that competition grows and flourishes in Tennessee.”²² The *Petition* clearly identifies the Petitioners’ interests in the request.²³ Finally, the *Petition* references the legal basis for the Authority to take the requested action stating, “the TRA has the authority to grant the requested relief pursuant to . . . T.C.A. § 65-4-124(a).”²⁴

IV. Conclusion

Given the direction provided in the Tennessee Court of Appeals’ *Tennessee Cable Television Association v. Tennessee Public Service Commission* decision and the pleading requirements of Tenn. Code Ann. § 4-5-201, it is recommended that the Authority accept the *Petition* as a petition for a rule pursuant to Tenn. Code Ann. § 4-5-201.²⁵ Before determining whether to grant or deny the petition for a rule, the Authority must, at a minimum, determine whether the standards for requiring the unbundling of network elements contained in 47 C.F.R. § 51.317 have been met with regard to local switching in Tennessee. In order to facilitate this determination, the Hearing Officer recommends the following procedural schedule:

- Discovery requests²⁶ shall be filed with the Authority and served on all announced and identified interested persons²⁷ by 2:00 p.m., Friday, May 24, 2002.
- A proposed protective order signed by all announced and identified interested persons shall be filed by 2:00 p.m., Friday, May 24, 2002.

²² *Id.* at 4.

²³ *Id.*

²⁴ *Id.* at 1.

²⁵ The Coalition may oppose this recommendation. If so, an alternative is to close the contested case proceeding.

²⁶ Discovery requests intended solely to aid the Authority in this fact-finding process may also be served upon any Tennessee-certificated facilities-based competing service providers and shall be answered within the time frame established herein. Although the Authority may employ other means to gather the requisite information, permitting discovery may be the most expedient.

²⁷ The parties of record to the contested case proceeding shall be deemed announced and identified interested persons. Other entities or persons wishing to participate in this matter on a going forward basis may file a notice of appearance with the Authority, after which they will become announced and identified. Nonetheless, any interested person may participate in this proceeding.

- Objections to discovery requests shall be filed with the Authority and served on all announced and identified interested persons by 2:00 p.m., Friday, May 31, 2002.
- Responses to discovery requests shall be filed with the Authority and served on all announced and identified interested persons by 2:00 p.m., Friday, June 7, 2002.
- Pre-filed direct testimony or comments shall be filed with the Authority and served on all announced and identified interested persons by 2:00 p.m., Friday, June 21, 2002.
- Pre-filed rebuttal testimony or comments shall be filed with the Authority and served on all announced and identified interested persons by 2:00 p.m., Friday, June 28, 2002.²⁸

Upon completion of the fact-finding process, the Authority will determine whether to grant or deny the petition for a rule. If granted, this proceeding shall continue in accordance with the rulemaking requirements set forth in the Uniform Administrative Procedures Act.

Any interested person may file comments on this Report and Recommendation on or before 2:00 p.m., Thursday, May 16, 2002.

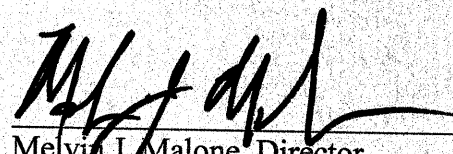
IT IS THEREFORE RECOMMENDED THAT:

1. The Authority close the contested case proceeding.
2. The Authority accept the *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Unbundled Switching an Unrestricted Unbundled Network Element* as a petition for a rule, pursuant to Tenn. Code Ann. § 4-5-201.
3. The Authority adopt the procedural schedule set forth herein.

²⁸ It is the expectation of the Authority that the parties to the contested case proceeding, herein deemed announced and identified interested persons, will submit pre-filed testimony, as opposed to comments.

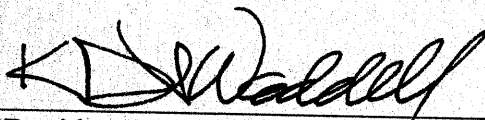
4. The Authority's Executive Secretary serve a copy of this First Report and Recommendation upon all Tennessee-certified telecommunications service providers.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Melvin J. Malone', written over a horizontal line.

Melvin J. Malone, Director
As Hearing Officer

ATTEST:

A handwritten signature in black ink, appearing to read 'K. David Waddell', written over a horizontal line.

K. David Waddell, Executive Secretary